

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

On July 25, 2003 appellant filed a notice of recurrence (Form CA-2a), alleging that on June 11, 2003 he had worsening pain in the right shoulder and neck. By decision dated November 13, 2003, OWCP denied his claim for a recurrence of disability. On February 6, 2004 appellant requested reconsideration and submitted medical evidence. By decision dated March 29, 2004, OWCP denied modification of the November 13, 2003 decision.

By decision dated August 10, 2004, OWCP found that appellant's actual earnings as a full-time light-duty carrier, effective March 11, 2003, fairly and reasonably represented his wage-earning capacity. As the pay in that position was equivalent to the pay rate for the position appellant held at the time of his injury, no loss of wage-earning capacity (LWEC) occurred.²

In a letter dated March 26, 2005, appellant requested reconsideration of the decision dated March 29, 2004. The envelope containing the request was not retained in the record. Appellant asserted that he submitted sufficient evidence to support his claim for recurrence of disability on June 11, 2003.

By decision dated July 6, 2005, OWCP denied appellant's application for reconsideration on the grounds that the request was not timely filed and that he did not present clear evidence of error by OWCP.

On August 2, 2005 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated August 16, 2005, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing. It found that since he had previously requested reconsideration on the same issue he was not entitled to an oral hearing as a matter of right.

On September 27, 2005 appellant appealed to the Board. By order dated December 16, 2005, the Board noted that OWCP failed to produce the case record and remanded the case for reconstruction and proper assemblage of the case record. The Board advised that, to fully protect appellant's appeal rights, an appropriate decision should be issued.³

By decision dated June 13, 2007, OWCP denied appellant's request for reconsideration of the March 29, 2004 decision, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On February 4, 2008 appellant appealed the June 13, 2007 decision to the Board. By decision dated February 11, 2009, the Board found the case not in posture for decision, finding that appellant's March 26, 2005 request for reconsideration was timely filed. It set aside the

² On August 24, 2004 appellant filed a Form CA-2a, alleging that on August 4, 2004 his right shoulder dislocated. By decision dated April 5, 2005, OWCP denied his claim for a recurrence of disability beginning on August 4, 2004. On July 8, 2005 appellant requested reconsideration of OWCP's decision dated April 5, 2005, which denied his recurrence of disability of August 4, 2004.

³ Docket No. 05-1986 (issued December 16, 2005).

June 13, 2007 decision and remanded the case to OWCP to apply the proper standard of review for timely requests for reconsideration, to be followed by a *de novo* decision.⁴

By decision dated May 1, 2009, OWCP denied modification.

On May 4, 2010 appellant requested reconsideration. By decision dated July 29, 2010, OWCP denied modification of the May 1, 2009 decision. On November 30, 2010 appellant again requested reconsideration. By decision dated December 29, 2010, OWCP denied his request for reconsideration, of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On March 17, 2011 appellant appealed to the Board. By order dated January 25, 2012, the Board found the case not in posture for decision. OWCP did not properly consider all the evidence submitted at the time of the December 29, 2010 decision. It set aside the December 29, 2010 decision and remanded the case to OWCP for proper consideration of the evidence followed by a *de novo* decision.⁵

In a decision dated May 24, 2012, OWCP denied modification of the July 29, 2010 decision.

On May 28, 2013 appellant requested reconsideration. By decision dated June 14, 2013, OWCP denied his request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

OWCP continued to receive medical evidence related to appellant's right shoulder conditions.

On February 19, 2021 appellant requested reconsideration. He requested a "reversal of the WEC determination." Appellant indicated that he returned to work on March 15, 2003 pursuant to a March 11, 2003 limited-duty job offer and worked for 18 days or 144 hours. He stopped work on April 10, 2003 and underwent surgery under a separate claim, OWCP File No. xxxxxx125. Appellant returned to limited-duty work on June 5, 2003 under the March 11, 2003 job offer and worked an additional 25.72 hours. He indicated that it became clear to him that his shoulder and neck conditions precluded him from performing the March 11, 2003 job offer. Appellant reported working 1.72 hours on June 11, 2003 and was placed off duty by his attending physician. He noted that this was the last day he worked for the employing establishment.

By decision dated May 20, 2021, OWCP denied appellant's request for reconsideration, finding that the evidence presented was insufficient to warrant merit review.

The Board having duly considered this matter finds that this case is not in posture for decision.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of

⁴ Docket No. 08-877 (issued February 11, 2009).

⁵ Docket No. 11-1038 (issued January 25, 2012).

the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to establish a modification of the LWEC determination.

The Board finds that appellant's February 9, 2021 request for reconsideration was, in fact, a request for modification of the August 10, 2004 LWEC determination.⁶ It is well established that a claimant may establish that a modification of an LWEC determination is warranted if there has been a showing that the original determination was, in fact, erroneous.⁷

The Board has held that when an LWEC determination has been issued and appellant submits evidence with respect to one of the criteria for modification OWCP must evaluate the evidence to determine if modification is warranted.⁸

As OWCP improperly reviewed the case under the standard for reconsideration requests, the case must therefore be remanded to OWCP for a proper decision which includes findings of fact and a clear and precise statement regarding whether appellant has met his burden of proof to establish modification of the LWEC determination.⁹ Following any further development as deemed necessary, OWCP shall issue a *de novo* decision.

⁶ 20 C.F.R. § 10.511; *see C.H.*, Docket No. 19-1114 (issued April 30, 2020); *A.S.*, Docket No. 18-0370 (issued March 5, 2019); *Tamra McCauley*, 51 ECAB 375 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

⁷ *Id.*

⁸ *See L.P.*, Docket No. 18-1429 (issued March 8, 2019).

⁹ *See L.P.*, Docket No. 20-0154 (issued April 7, 2021). *R.Z.*, Docket No. 17-1455 (issued February 15, 2019).

IT IS HEREBY ORDERED THAT the May 20, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: May 20, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board